"There is no justification for a comparison of negligences or the apportioning of their effect. The pulling out of the drawbar produced a condition which demanded an instant performance of duty by Wiles—a duty not only to himself, but to others. The rules of the company were devised for such condition and provided for its emergency. Wiles knew them, and he was prompted to the performance of the duty they enjoined (the circumstances would seem to have needed no prompting) by signals from the engineer when the train stopped. He disregarded both. His fate gives pause to blame, but we cannot help pointing out that the tragedy of the collision might have been appalling. He brought death to himself and to the conductor of his train. His neglect might have extended the catastrophe to the destruction of passengers in the colliding train. How imperative his duty was is manifest. To excuse its neglect in any way would cast immeasurable liability upon the railroads, and, what is of greater concern, remove security from the lives of those who travel upon them, and therefore, all who are concerned with their operation, however high or low in function, should have a full and an anxious sense of responsibility.

"In the recent case there was nothing to extenuate Wiles negligence; there was nothing to confuse his judgment or cause hesitation. His duty was as clear as its performance was easy. He knew the danger of the situation and that it was imminent; to avert it he had only to descend from his train, run back a short distance, and give the signals that the rules directed."

Employers' Liability Act—Independent Contractor.—In the case of Chicago, Rock Island & Pacific R. R. *v.* Bond, 36 Sup. Ct. R., 403, it appeared that a contract had been made between a railway company and an original contractor by which he was to handle at the company's coal chutes the coal required for its engineer, furnishing the necessary labor for that purpose, to break the coal in suitable sizes, to unload wood from car to storage piles, load cinders on cars and unload sand. The manner of the work to be performed by him or his employees was under his control and he was made responsible for the faithful performance of the agreement, incurring the penalty of instant termination of the contract for nonperformance. The contract also provided for payment on the basis of tons, cars or yards, and the "contractor" expressly assumed all liability for injuries to himself or to his property, or to his employees or third persons, and there was an explicit provision that the carrier "reserves and holds no control over him in the doing of such work other than as to the results to be accomplished." It was held under such arrangement that no relation of master and servant was created or could be inferred on the part of the defendant railway

company toward the contractor so as to render it liable to him or his representatives under the Federal Employers' Liability Act, and further, that no provision of such contract constituted an evasion of the Federal statute. On this point the court said:

"We do not think that the contract can be regarded as an evasion of section 5 of the Employers' Liability Act, which provides 'that any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void * * *' (35 Stat. at L., 66, chap. 149, Comp. Stat. 1913, sec. 8661).

"Turner was something more than a mere shoveler of coal under a superior's command. He was an independent employer of labor, conscious of his own power to direct, and willing to assume the responsibility of direction and to be judged by its results. This is manifest from the contract under review, and from the cooperage contract; it is also manifest from his contracts with the other companies to whose industries the railroad company's tracks extended. We certainly cannot say that he was incompetent to assume such relation and incur its consequences.

"Thus, being of opinion that Turner was not an employee of the company, but an independent contractor, it is not material to consider whether the services in which he was engaged were in interstate commerce."

Expert Witnesses—Witnesses—Examination—Criminal Law—Instructions—State v. Horne (N. C.), 88 S. E. 433.—The following principles relating to the introduction and examination of witnesses in criminal cases and the propriety of instructions thereon are deduced from the opinion in the principal case.

It is within the sound discretion of the trial judge to call to the stand any witness and examine him, so that it is not error for the court on its own motion to call in an expert alienist, using care not to prejudice the rights of the defendant thereby, and the court may examine witnesses tendered by either side, and this practice is especially allowable in the matter of expert witnesses who were originally regarded as amici curiæ.

The Court in the principal case used the following language: "It has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side whenever he sees fit to do so, and the calling of a witness on his own motion differs from his practice in degree and not in kind. This practice, in the case of ordinary witnesses, has been approved in some instances. Clark *v.* Com., 90 Va. 360, 18 S. E. 440; Hill *v.* Com., 88 Va. 633, 14 S. E. 330, 29 Am. St. Rep. 744; O'Connor *v.* Ice Co., 121 N. Y. 662, 24 N. E. 1092; 57 L. R. A. 875, note. This practice is especially allowable in the